

SERVED: March 16, 1993

NTSB Order No. EA-3825

UNITED STATES OF AMERICA  
**NATIONAL TRANSPORTATION SAFETY BOARD**  
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 9th day of March, 1993

_____	)	
JOSEPH M. DEL BALZO,	)	
Acting Administrator,	)	
Federal Aviation Administration,	)	
	)	
Complainant,	)	
	)	Docket SE-11024
v.	)	
	)	
SOUTHERN FLYERS, INC.,	)	
	)	
Respondent.	)	
_____	)	

**OPINION AND ORDER**

Respondent seeks review of the decision of Administrative Law Judge William R. Mullins to grant a motion filed by the Administrator to dismiss respondent's appeal for his failure to comply with an order compelling discovery. In support of his objection to that ruling, respondent argues, without attempting to demonstrate that his noncompliance was legally justified or excusable, that his due process rights will be violated if he

does not receive a hearing on the merits of the case.<sup>1</sup> The Board affirms the dismissal.

A brief review of the procedural events leading up to the dismissal is warranted. On April 11, 1990, the Administrator issued an order of revocation of respondent's Air Carrier Operating Certificate for alleged violations of Federal Aviation Regulations 135.35 and 135.13(a)(2), 14 C.F.R. Part 135.<sup>2</sup> The order of revocation alleged the following facts:

1. At all times material herein you were and are the holder of Air Carrier Operating Certificate No. AT-761-105 with operations specifications issued under Part 135 of the Federal Aviation Regulations.
2. Information available to the Administrator indicates that for a period of at least one year, Southern Flyers has not conducted aeronautical operations under its certificate and has terminated flight operations.
3. Southern Flyers has not surrendered to the

---

<sup>1</sup>The Administrator filed a brief in reply.

<sup>2</sup>FAR sections 135.35 and 135.13(a)(2), as were in effect at the relevant time, provided as follows:

**"§ 135.35 Termination of operations.**

Within 30 days after a certificate holder terminates operations under this part, the operating certificate and operations specifications must be surrendered by the certificate holder to the FAA Flight Standards District Office charged with the overall inspection of the certificate holder.

**§ 135.13 Eligibility for certificate and operations specifications.**

(a) To be eligible for an ATCO operating certificate and appropriate operations specifications, a person must--

\* \* \* \* \*

(2) Show, to the satisfaction of the Administrator, that the person is able to conduct each kind of operation for which the person seeks authorization in compliance with applicable regulations . . . ."

Administrator its certificate or operations specifications within thirty (30) days after terminating flight operations.

4. Southern Flyers lacks qualifications to hold any air carrier certificate.

Following respondent's appeal to the Board from the revocation order, the Administrator sent a request for discovery dated August 28, 1990 to respondent's address of record. There was no response. On November 28, 1990, the Administrator filed a motion to compel discovery. On December 7, 1990, the respondent's attorney responded to the motion to compel stating that the respondent had not provided him with the documents requested and asking to be excused from the case. The response also contained a new address for the respondent. On January 4, 1991, Administrative Law Judge Jimmy Coffman issued an order compelling discovery (within 30 days) and accepting attorney resignation. The order was sent to the respondent's new address with a copy to the attorney. On February 8, 1991, the Administrator filed a motion to dismiss based on respondent's failure to comply. On March 6, 1991, in a hearing on the issue of dismissal, the respondent, through counsel, conceded that correspondence sent to the new address would have been received by the respondent company's president. Administrative Law Judge William R. Mullins granted the Administrator's motion to dismiss.

The law judge found that the entire record reflects a lack of interest in the proceedings on the part of the respondent. The Board agrees with the suggestion in the Administrator's reply brief that this finding was tantamount to a finding of wilful

disregard of the process the Board has established for hearing appeals of this kind. We further agree, therefore, that respondent's failure to comply with the law judge's order compelling discovery was sufficient to justify granting the Administrator's motion to dismiss.<sup>3</sup> Since the reason why no hearing on the merits was held was the respondent's own failure to prosecute his appeal in accordance with Board procedures, it is the respondent, and not the Board, who bears responsibility for any deprivation of rights he may suffer because his case was not fully litigated.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. The respondent's appeal is denied; and
2. The decision of the law judge dismissing respondent's appeal is affirmed.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

---

<sup>3</sup>*Cf., Administrator v. Dunn*, 3 NTSB 4139 (1981), *recons. denied*, 4 NTSB 225 (1982) (Dismissal for inadvertent failure to respond to discovery reversed where, among other things, no motion to compel had been filed).